termed a "windfall to the insurer,"[29] it is submitted that the court was correct in refusing to extend the doctrine of subrogation to cover this situation. D. D.

INSURANCE — TOTAL AND PERMANENT DISABILITY IN LIFE INSURANCE

The insured had a policy of life insurance which provided for the payment of disability benefits and waiver of premiums in the event he "has become totally and permanently disabled and will for lifetime be unable to perform any work or engage in any business for compensation or profit." He was afflicted with ulcers at the age of fifty-nine, while employed as a roll-superintendent of a steel corporation. By reason of the affliction he was confined to his bed for a number of months and was only able to return as a watchman for three or four weeks and was forced to discontinue this because of fatigue. The Supreme Court sustained the Court of Appeals[1] and held that the provision would not be taken literally, allowing the insured to recover benefits for total and permanent disability.[2]

The use of the disability clause in life insurance is comparatively new; the regular life companies did not adopt it generally until 1907.[3] The clause was added for a nominal cost and became a very good selling point. However, its legal interpretation has caused a great deal of difficulty and has been one of the major problems of life insurance companies.[4] Unlike death, which is one of the most unequivocal of insured events, or even fire which has only occasionally given rise to litigation, total and permanent disability is not unambiguous and is capable of several interpretations. If strictly interpreted it would seem to deny benefits to all except the absolutely helpless.[5] Such an interpretation would

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[29] PATTERSON, ESSENTIAL OF INS. LAW (1935), p. 122—Patterson weighs the necessity for the doctrine of subrogation.

[1] *Gibbons* v. *Metropolitan Life Insurance Co.*, 62 Ohio App. 280, 15 Ohio Op. 594, 23 N.E. (2d) 662 (1938).

[2] *Gibbons* v. *Metropolitan Life Insurance Co.*, 135 Ohio St. 481, 21 N.E. (2d) 588 (1939).

[3] First policies (life) containing this clause appeared in Germany in 1876 and in American Fraternal Orders in the following year. It appeared in regular life companies in United States in 1896 but not generally till 1907 and thereafter. HUNTER, TOTAL AND PERMANENT DISABILITY BENEFITS IN RELATION TO LIFE INSURANCE (1920) p. 1.

Mutual Life Insurance Co. in 1896 was the first life company in United States to adopt it. GEPHART, INSURANCE (1917) Vol. 1, p. 174.

[4] Insurance company will also face other hazards. Insured may pretend to be more seriously incapacitated than he really is and the prospect of a long rest at the expense of the company may psychologically retard his recovery. Insured's mental attitude may prolong the insured event and continue physical disability. Insured's income also has a bearing on these risks, if the amounts payable are comparable to or more than his earnings.

[5] *Ohio National Life Insurance Co.* v. *Stagner*, 231 Ky. 275, 21 S.W. (2d) 289; *Prudential Insrance Co.* v. *South*, 179 Ga. 653, 177 S.E. 499 (1934).

greatly decrease the desirability of the clause in the eyes of the prospective policy holders and even insurance companies have admitted that so extreme an interpretation was never intended.[6] But, if the most extreme interpretation is to be rejected and a somewhat more liberal approach authorized, we are left without definite guides as to how broad an interpretation may be given the clause, and it is not surprising that courts have differed in their construction of the wording.

Similar clauses have long been common in accident policies but courts have made no distinction between them and life policies, either failing to recognize the possibility of a different construction or holding that since the life policies are framed and sold with provisions covering the field usually occupied by accident insurance, like terms need impose like obligations.[7] A basis for a distinction would lie in the fact that most accident policies are cancellable at the end of a year while a life policy would be non-cancellable[8] and the companies' risk would increase with the age of the insured.[9] Likewise, the original purpose of the clause was to guarantee to the insured, in case he became disabled, the continuance of his life policy and some income to relieve his minor needs, but the courts have held that such a contract of insurance is not one of indemnity against loss of income but rather against loss of capacity to work.[10] Of all the types of insurance policies, accident insurance has been most strictly construed against the insurer and the liberal construction which is given to most of the accident clauses has tended to support a similar construction wherever found.

Most of the disability clauses are of two types: first, those providing that the insured must be disabled from engaging in his own occupation or business, and second, those providing that the party must be disabled from engaging in any occupation or pursuing any business for wages or profit. The first clause has not given so much difficulty and some courts have left it to the jury to decide.[11] Most courts hold that this clause does not mean absolute physical inability to transact any kind of business relating to the insured's occupation but rather inability to perform the sub-

[6] See brief of counsel for insurance company in the principal case, p. 486, (see footnote 2, *supra*).

[7] *Metropolitan Life Insurance Co.* v. *Blue*, 222 Ala. 665, 133 So. 707 (1931); 6 COOLEY'S BRIEFS ON INSURANCE (2d ed., 1928) p. 5536; 79 A.L.R. 858.

[8] Non-cancellable disability income insurance is designed to protect against the "living death," the worst of the three forms of death to the self-supporting individual, the other two being the "actual death" and the "retirement death." HUEBNER, INSURANCE (1935) p. 423.

[9] GEPHART, *op. cit.*, n. 3, p. 174.

[10] *Backman* v. *Traveler's Insurance Company*, 78 N.H. 100, 97 Atl. 223 (1916); *Suttles* v. *Railway Mail Association*, 156 App. Div. 435, 141 N.Y. Supp. 1024 (1913).

[11] *Lobdill* v. *Laboring Mutual Aid Association*, 69 Minn. 14, 71 N.W. 696 (1897); *American Liability Co.* v. *Bowman*, 65 Ind. App. 107, 114 N.E. 992 (1917).

stantial acts connected with his occupation.[12] Performance of single or trivial acts or even acts he had been accustomed to do before would not preclude recovery.[13] The fact that the insured might receive some profit in a business owned by him or a gift in wages has been held not to bar a recovery, at least where he does not substantially carry on the business or occupation.[14] Some courts have held that it would be enough if the injury were such that common care or prudence require him to desist from his labors and rest, so long as this was reasonably necessary to effectuate a cure.[15]

The second type of clause is the more common and is the one found in the principal case. Its construction has given the courts more difficulty. On one hand, some courts, including North Carolina, Pennsylvania, and Tennessee, have given the clause a fairly literal interpretation and have held that it is plain and unambiguous and needs no construction.[16] They would say that the insured is not totally disabled if he can carry on any real work, though not necessarily of the same nature or type he was previously engaged in.[17] The Iowa court in a series of recent cases has continued to follow the doctrine although admitting that it cannot be reconciled with most of the cases in the country.[18]

The weight of authority, then, supports a more liberal view. Many courts argue that a clause which provides that an insured is disabled if he is unable to perform any work should be construed to mean any work for which he may be fitted by his experience, education, age, or natural ability.[19] They would say that although the insured might perform some work or engage in some profession for which he is not fitted, such possibility would not preclude a recovery.[20] Along this line it has been

[12] *National Life and Accident Insurance Co.* v. *Bradley*, 245 Ky. 311, 53 S.W. (2d) 70 (1932); *Jacobs* v. *Loyal Protective Insurance Co.*, 97 Vt. 516, 124 Atl. 848 (1924); *Aetna Life Insurance Co.* v. *Phifer*, 160 Ark. 98, 254 S.W. 335 (1923).

[13] *Bosworth* v. *Mutual Life Insurance Co.*, 114 W.Va. 663, 173 S.E. 780 (1934); *Prudential Insurance Co.* v. *Kelsay*, 257 Ky. 263, 78 S.W. (2d) 923 (1935).

[14] *Medlinsky* v. *Metropolitan Life Insurance Co.*, 146 Misc. 855, 263 N.Y.Supp. 179 (1933).

[15] *Young* v. *Traveler's Insurance Co.*, 80 Me. 224, 13 Atl. 896 (1888); *Hayes* v. *North American Life and Casualty Co.*, 151 Minn. 124, 186 N.W. 136 (1932).

[16] *Thigpen* v. *Jefferson Standard Life Insurance Co.*, 204 N.C. 551, 168 S.E. 845 (1933); *Cooper* v. *Mutual Life Insurance Co.*, 317 Pa. 405, 177 Atl. 43 (1935); *Prudential Insurance Co.* v. *Davis*, 18 Tenn. App. 413, 78 S.W. (2d) 358 (1934).

[17] *Lee* v. *New York Life Insurance Co.*, 188 N.C. 538, 125 S.E. 186 (1924); *Buckman* v. *Jefferson Standard Life Insurance Co.*, 172 N.C. 762, 90 S.E. 897 (1916).

[18] See *Hurley* v. *Banker's Life Co.*, 198 Iowa 1129, 199 N.W. 343 (1924); *Corsaut* v. *Equitable Life Assurance Society*, 203 Iowa 741, 211 N.W. 222, 51 A.L.R. 1035 (1927); *Kurth* v. *Continental Life Insurance Co.*, 211 Iowa 737, 234 N.W. 201 (1931); *Garden* v. *New England Mutual Life Insurance Co.*, 254 N.W. 287 (1934).

[19] *Wall* v. *Continental Casualty Co.*, 111 Mo. App. 504, 86 S.W. 491 (1905); *Aetna Life Insurance Co.* v. *Person*, 188 Ark. 864, 67 S.W. (2d) 1007; *Katz* v. *Union Central Life Insurance Co.*, 226 Mo. App. 618, 44 S.W. (2d) 1250 (1932).

[20] *Arico* v. *Prudential Insurance Co.*, 241 App. Div. 826, 271 N.Y. Supp. 241 (1934); *Ursaner* v. *Metropolitan Life Insurance Co.*, 146 Misc. 121, 262 N.Y. Supp. 462 (1933).

held that a knee injury to a day laborer which prevented his performance of any manual labor was a total disability, although it would not of course prevent a man from engaging in a business or profession.[21] Likewise a physician was considered totally disabled from performing any work when a mental infirmity causing forgetfulness made it impossible to continue in his profession.[22]

Other courts follow an even more liberal rule and grant indemnity when the insured is prevented from following his usual vocation although the language does not thus restrict the disability to be indemnified.[23] They hold that the language is so broad that a literal interpretation would be absurd and come to the conclusion that the insurer must mean the vocation or calling the insured was engaged in at the time he became disabled.[24] It is not unusual for the courts to announce that they are crediting the insurance company with the highest motives and thus rationalize an interpretation that is not apparent from the language itself.[25]

The word "permanent" in the phase "total and permanent disability" has also been construed by the courts, but has caused them less difficulty. If used in its strict lexigraphical meaning, it stands for infinite duration and in this respect could never be determined until the death of the insured.[26] However, the word is a relative one and its significance depends upon the subject matter in connection with which it is employed.[27] It may be said, for example, that a person has a permanent position but this does not necessarily mean for life. The problem has been, for the most part, settled by the companies themselves, by a provision in the policy specifying a certain period of time after which the disability will be presumed to be permanent. In addition, they may make annual proof of continued disability a condition precedent to the recovery of benefits,[28] and such a provision, as the court in the instant case points out, is scarcely consistent with the most literal meaning of the word "permanent."

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[21] *Industrial Mutual Indemnity Co.* v. *Hawkins*, 94 Ark. 417, 127 S.W. 457 (1910).

[23] *Missouri State Life Insurance Co.* v. *Case*, 189 Ark. 223, 71 S.W. (2d) 199; see also *Aetna Life Insurance* v. *Person* (cited *supra* footnote 19).

[23] *Gordon* v. *United States Casualty Co.*, (Tenn. Ch.) 54 S.W. 98 (1899); *Niel* v. *United Friends*, 78 Hun. 255, 28, N.Y. Supp. 928 (1894); *Mutual Benefit Association* v. *Mancarrow*, (Colo. App.) 71 Pac. 423 (1903); *Prundential Insurance Co.* v. *Harris*, 254 Ky. 23, 70 S.W. (2d) 949 (1934).

[24] *Foglesong* v. *Modern Brotherhood*, 121 Mo. App. 548, 97 S.W. 240 (1906); *Davis* v. *Midland Casualty Co.*, 190 Ill. App. 338 (1914).

[25] *United States Fidelity and Guaranty Co.* v. *McCarthy*, (C.C.A. 8th) 50 F. (2d) 2 (1931).

[26] 40 A.L.R. 1386; HUEBNER, INSUBANCE (1935) p. 421.

[27] *Penn Mutual Life Insurance Co.* v. *Milton*, 160 Ga. 168, 127 S.E. 140 (1925).

[28] ". . . insured shall at any time, but not oftener than once a year, on demand of the company, furnish due proof of the continuance of such disability and permit examination by a medical examiner of the company. . . ."

Courts following the liberal interpretation do not penalize the insured because he attempts to perform some sort of work. They hold that he is rendered wholly unable to engage in any occupation or perform any work for compensation if his condition is such that he is unable to work without running the risk of increasing his disability or shortening his life.[29] Generally, attempts to do work will not preclude recovery even though the insured succeeded in doing some work.[30] This result seems fair; if held otherwise the insured would tend to refrain from any attempts to work and thus protect his possibility for a recovery.[31]

The liberal attitude of the courts in construing these clauses and the adverse experience [32] of the companies, particularly in the early stages of the depression, led to a general revision and restriction of the disability clause in 1932. One group of companies issuing about sixty per cent of the country's new insurance, decided to discontinue the disability income provision and retain only the waiver of premium provision. The rest of the companies increased the monthly waiting period to six months and reduced the monthly income from one per cent of the face of the policy to one-half per cent and the age limit was reduced to fifty-five.[33] But these changes have no effect on life policies which had been written prior to 1932 and the life companies may expect a continued loss on the old disability provisions under the liberal interpretation given by most courts. Accident companies with their annual policies could very well meet the need for disability protection and cope with the problem of regulating rates to conform with their experience in payment of benefits.

The clause has been involved in several other Ohio cases but in only one did the decision turn upon the meaning of the disability phrase. In *Mosher* v. *Equitable Life Assurance Society of the United States*,[34] the court held in favor of the insurer, relying largely on *Hurley* v. *Banker's Life Co.*[35] The principal case has clearly adopted the broader construction. In addition to declaring that the terms must be liberally construed, it specifically holds that an insured is totally and permanently disabled if

[29] *Rezenda* v. *Prudential Insurance Co.*, 285 Mass. 505, 189 N.E. 826 (1934); *Clarkson* v. *New York Life Insurance Co.*, (1933, D.C.) 4 F. Supp. 791; *Mutual Life Insurance Co.* v. *Dowdle*, 189 Ark. 296, 71 S.W. (2d) 691 (1934).

[30] *Booth* v. *United States Fidelity and Guaranty Co.*, (N.J.L.) 130 Atl. 131 (1925); *Kramer* v. *Traveler's Insurance Co.*, 111 Pa. Super. 367, 170 Atl. 700 (1934).

[31] *Monahan* v. *Supreme Lodge of the Order of Columbian Knights*, 88 Minn. 224, 92 N.W. 972 (1903).

[32] Concept of disability is inadequate to furnish criterion in gathering statistical data. PATTERSON, INSURANCE (1st ed. 1935) p. 209.

Latest definition of disability in terms of reduction in the insured's income might eliminate the intangible factors but Massachusetts refused permission to use it. See *Mutual Benefit Life Insurance Co.* v. *Commissioners*, 271 Mass. 365, 171 N.E. 656 (1930).

[33] HUEBNER, LIFE INSUBANCE (1935) p. 431.

[34] 57 Ohio App. 435, 14 N.E. (2d) 413 (1936)

[35] Note 18, *supra*.

because of the ulcer he is unable to pursue his regular vocation or employment. Ohio is thus placed definitely in the majority liberal group. In fact, the specific nature of the test would indicate that its position in the group is well toward the front. H. D. R.

NEGOTIABLE INSTRUMENTS

Negotiable Instruments — Effect of Higher Interest Rate after Maturity — Contract for Liquidated Damages or Penalty — Effect Upon Negotiability

The defendants executed a promissory note to a bank, for which the plaintiff was receiver, for $7000 due in one year, with interest at six per cent per annum. In addition, it contained a provision that the note should draw interest at eight per cent per annum after maturity to be computed and paid semi-annually until the principal and accrued interest were paid. In a suit on the note to recover eight per cent, the Court of Appeals held that where money is paid by the borrower to the lender for the use of money after it is past due it is regarded as liquidated damages, and that the parties may stipulate in the lending contract for a rate of interest after maturity higher than the rate before, but it must not exceed the maximum rate prescribed by the usuary statute.[1]

This exact situation seems to be a case of first impression in Ohio. However, there are two earlier cases somewhat related which furnish an interesting comparison. In addition, a question arises as to the court's interpretation of sec. 8303 Ohio G.C., that is, does this section expressly authorize a stipulation for a higher interest rate after maturity than before?

"In Ohio, the agreement is legal, expressly made so by statute (sec. 8303 G.C.)"[2] With those words, the court in the principal case accepts

[1] *Hackett* v. *Kripke et al*, 62 Ohio App. 89, 23 N.E. (2d) 438 (1939). In the principal case the provision in the note that it was to be eight per cent per annum "payable semi-annually" was not discussed. A question arises as to whether or not this is usurious under Section 8303 which provides that the interest must "not exceed eight per cent per annum, payable annually." In *Cook* v. *Courtright*, 40 Ohio St. 248 (1883), the court held that a stipulation that the interest was to be eight per cent per annum payable semi-annually was not usurious under Section 8303. The court held that a contract to pay eight per cent per annum on a given principal payable semi-annually, the interest to be paid on that principal, is the same thing as eight per cent per annum payable annually upon the same principal. However, under the same statute, if the interest is at eight per cent per annum payable annually in advance, it is usurious. Thus, if a note is for $12,000 at eight per cent per annum payable in advance and if the interest is deducted from the principal before giving it to the borrower, the borrower pays eight and sixty-eight one hundredths per cent on the amount actually received for his use. *Insurance Co.* v. *Carpenter*, 40 Ohio St. 260 (1883). It is interesting to note that these two cases were decided during the same term.

[2] *Supra* note 1.